I may also say, Sir, that I don't claim that the Bill is perfect. It is for the law officers to lick it into shape, and even send it to a select committee if necessary.

Mr. A. V. Moothedan *(Chalakkudi)*: May I know whether in British India a similar legislation has been passed. I don't think I am not against the principles of the Bill. It is a post-war problem which is very complicated and we can very well wait and see what the British Government is doing for British India, and after all we form only a very small part of the citizens in enemy hands. I think there is no harm if it is referred to committee for report, and wait and see what the other parts of India do in the matter. A law is necessary, because the law of limitation is there and pronotes expire after 3 years, and we are not sure when the hostilities may cease and when those persons in enemy hands would be enabled to claim their money through a civil court.

Mr. M. Sivarama Menon *(Advocate-General)*: I must thank the Hon'ble Member for Planters for having brought this Bill which has enabled Government to consider the question in all its aspects and make enquiries. The enquiry conducted by the Government goes to show that some sort of protection is necessary for the Cochin subjects in enemy hands. I am very glad that the Hon'ble Member for Planters has tabled this Bill for this purpose. The principle of the Bill is accepted by the Government and has been rightly observed by the mover of the Bill, it is very likely that this Bill will have to undergo radical changes in a select committee. Government are very glad to accept the principle involved in this Bill.

Mr. V. J. Mathai *(Planters)*: I have nothing to say in reply except that the Bill may get the acceptance of the House.

Motion put and carried

Secretary to the Council: The title of the Bill is "The Cochin Citizens in Enemy Hands Protection Bill".

Mr. V. J. Mathai *(Planters)*: I now move, Sir, that the Bill be referred to a select committee consisting of the following members.—

1. Advocate-General
2. Diwan Peishkar
3. Mr. P. Kumaran Ezhuthassan
4. Mr. K. T. Achyutan
5. ,, A. V. Moothedan
6. ,, A. Eachara Menon

and the mover.

The Advocate-General is to be the Chairman of the Committee.

മിസ്റ്റർ വി. കെ. കുട്ടി: ഇതിൽ കച്ചവടക്കാരുടെ കാര്യവും നോക്കേണ്ടതുണ്ട്. അതിനു് മിസ്റ്റർ ഗോവിന്ദപൈയും വേണമെന്നാണു് ഞാൻ പറയുന്നതു്.

Mr. V. J. Mathai *(Planters)*: I have no objection.

Motion put and carried

Mr. V. J. Mathai *(Planters)*: I now suggest that the period for sending the report may be 2 months.

Mr. M. Sivarama Menon *(Advocate-General)*: I think the time is not enough. It may be fixed as 3 months.

Deputy President: The Advocate-General will be the Chairman of the Committee and the time will be 3 months.

The Cochin Specific Relief Act (Amendment) Bill

Mr. V. J. Mathai *(Planters)*: I move that the Cochin Specific Relief Act (Amendment) Bill be read in Council.

It is necessary to explain the principle of the Bill and its general provisions. The principle of the Bill is that our High Court should have definite powers as stated in the objects and reasons, to issue writs of mandamus, to persons bodies and corporations owing duties to the public. That is the principle of the Bill, and that is its object.

Now, Sir, this matter may be a little technical; I shall make it as clear as possible and non-technical as possible, so that even a layman can understand. I may tell you that the King's Bench of the High Court of Judicature of England have always been exercising the power of issuing a writ in the nature of mandamus, which means "we command", to persons, bodies and corporations including Government servants to do or forbear from doing a particular act. That power devolving, if I may say so, upon the High Courts were exercised in the High Courts of Fort William, Fort St. George and in Bombay. Those powers are being exercised by other High Courts now, and let us see what exactly is our position. I shall quote a typical instance in point; I have only to recite the facts in 'A. B. Salem versus Secretary to Government of Cochin'. There the question was whether a particular authority should be asked to exercise the function vested in him, namely to rectify the name of a voter. One can easily see the effect of

LIBRARY ARCHIVES Kerala Legislative Assembly

it. Suppose there is a voter in the Ernakulam constituency who wants to vote for a candidate in a particular place. Suppose his name is not included. Then he will have a grievance and it is not included for no reason whatsoever. He can go to the High Court and petition the High Court to see that his name is included. Anybody should be entitled to request that his name should be included in the voters' list. Suppose a wrong name is put in—somebody who is not entitled for a vote is put in the voters' list. Not only his opponents, but the whole public are interested in the question and also the Government, since we will be giving chances to undesirable persons to come in as a member of the legislature. Therefore, the power should be vested in every citizen of the State to appeal to the High Court and request the High Court to order for the removal of a name. This typical instance has come to the notice of our High Court in 'A. B. Salem versus Secretary to the Government of Cochin'. Now we have seen that the power has devolved upon the High Courts of Bombay, Madras and Bengal. The question really arises whether those powers exist in the High Court of Cochin. In the case referred to, two grounds were raised by the Advocate-General; one was that there is no original jurisdiction vested in the High Court. We have heard it this morning also; no jurisdiction to take up a complaint and examine the witnesses and pronounce judgment; those powers are vested in the District Courts and Munsiffs' Courts. Now, without going into arguments, it is only necessary to state the points. I may say that there are certain provisions in the Government of Cochin Act which seem to show that there is original jurisdiction in the High Court at least in certain cases, for example under section 41 (c), the power to withdraw and to try and determine, as a court of original jurisdiction, any civil suit pending in any court subordinate to it, etc., then again section 46—all writs, summons, precepts, rules and orders and other mandatory process to be used, issued etc. In short, as I said, every one can see that there seem to be certain provisions which would indicate—I don't say that they directly lay down—that our High Court has derived some powers. I would draw attention to para 4 of section 32 which shows what are the powers of our High Court and from where they have come. So far as Cochin is concerned as in every other State, the Ruler is the fountain of all justice, and the Court derives powers from the Ruler. In England most of the laws have evolved from conventions and customs. There is no Government of England Act at all. And in England these powers devolve on the King's Bench of the Division of the High Court. So far as India is concerned, as I have already observed, the High Courts also enjoy these powers. Drawing that anology, whatever may be the thorny question as to whether the Maharaja of a State is an independent sovereign or not, without going into that question, I have only to observe that for all practical purposes, His Highness the Maharaja of our State is the supreme sovereign of the Cochin State in treaty with His Majesty the King Emperor in England. Without going into that further, I will only say that certain powers for adjudication of certain cases between man and man have devolved upon the "Valia Kodathi" in the Cochin State, from which our Chief Court took form. Then came section 32 (1) of the Government of Cochin Act. The Chief Court of Cochin became the High Court. Section 32 (1) lays down that "the Chief Court of Cochin shall henceforth be designated the High Court of Judicature, Cochin, and shall, unless His Highness otherwise directs, consist of three Judges, one of whom shall be the Chief Justice". Now a man who runs in the street can see that if in England the power is vested in the King's Benches by convention or custom, and also in the High Courts of Madras, Bombay, Calcutta, likewise, the power was derived from His Highness the Maharaja by the Valia Kodathi and the Royal Court. To answer an observation by the Hon'ble Member for Kunnamkulam, I may say that the Government of Cochin Act changed the name of the Chief Court and defined certain of its powers. No where is it expressly laid down that a writ cannot be issued. One step further. In British India, as here, there is an Act called the Specific Relief Act I of 1877. There, there is an express provision so far as this particular matter is concerned. Section 45 of the Act runs thus "Any of the High Courts of Judicature at Calcutta, Madras and Bombay may make an order requiring any specific act to be done or forborne, within the local limits of its ordinary original civil jurisdiction, by any person holding a public office, etc. There is a specific section there. So far as our State is concerned, Act IV of 1097, which is the Specific Relief Act of the Cochin State, does not say anything on it.

In fact, the whole is a verbatim transcription of that, except this particular provision. In the case of 'A. B. Salem *v.* Secretary to Government,' Their Lordships decided that in the particular instance it was not necessary to go into that question, expressing a doubt as to whether the power is vested in them or not.

LIBRARY ARCHIVES Kerala Legislative Assembly

Mr. M. Sivarama Menon *(Advocate-General)*: There was already a previous decision in XVII Cochin that they have not got such a power. In Padiyar *v.* A. B. Salem the High Court has definitely held that they have not got the powers of the Kings Bench.

Mr. V. J. Mathai *(Planters)*: The only question is, without considering whether they have decided it or not, whether we should have an enactment corresponding to Chapter 8 of the British Specific Relief Act, and whether we should adopt and bring it here to give the power to our only High Court. Otherwise, we will have no remedy of the nature, because there is no provision in the Specific Relief Act. As I said, again the implications should be borne in mind. There is nothing to be kept back, because it is a very serious matter which should engage the attention of the Government and that of the High Court. The implication must be immediately understood. Certain powers which are only in the hands of the executive will become vested in the hands of the High Court. Therefore, as popular representatives, we will all be interested to see that the power is vested in the High Court, because you and I can run to the High Court which will be above all prejudices whatsoever. I only say that the Government being the executive, may be or may not be prejudiced. We must have the liberty to go to the High Court and make prayer for a writ to force any Government servant to exercise a function which he may refuse to exercise, or omit to exercise. So, when the High Court gets more power, the citizens of the Cochin State get more powers into their hands, the power for getting relief at the hands of the High Court and it should remain ever in the hands of the public. With these words, I submit this Bill for the acceptance of the House. This Bill also is not above all criticism. I do not boast myself to be the last authority on the subject, but a humble student who had gone into the question; and I must pay a tribute to an ex-member of this Council Mr. Panampilli Govinda Menon, who I hear, will be here before long, for sponsoring this Bill when he was here.

Mr. A. B. Salem *(Mattancheri)*: I beg to support this Bill. My contention will be that the High Court of Cochin has this power, always had it; and in the judgment of the Chief Justice in that case that has already been quoted, he has clearly said....

Mr. M. Sivarama Menon *(Advocate-General)*: He has said, "the High Court has or ought to have the power.

Mr. A. B. Salem *(Mattancheri)*: This is what the learned Chief Justice said.—"Although I do not wish to express definitely one way or the other with regard to the jurisdiction of this court to issue a writ of mandamus for the same reasons stated by my learned brother, I may observe that my own inclination is in favour of the assumption that this court has jurisdiction to entertain this application. The writ of mandamus is "a high prerogative writ usually issuing out of the highest court in a State in the name of the Sovereign directed to any natural person, corporation or inferior court of judicature within its jurisdiction requiring them to do some particular thing therein specified and which appertains to their office or duty". It is a common law writ and it is difficult to assume that this court which is the highest court in the State and which is dispensing justice in the name of the Sovereign has not got the power to issue this very useful writ in proper cases where it is clear that the advancement of justice cannot be attained in any other manner. I think from the very nature and status of this court at common law, this court has or ought to have the authority to issue a writ of mandamus in every case where there is no other specific legal remedy for a legal right and where justice requires that there ought to be one. The common law right of this Court to apply these means for the attainment of such an end has to be recognised in the interests of justice and good Government." That is exactly the position. The learned Chief Justice has got the spirit of jurisdiction of the highest Court. Let us take His Highness the Maharaja as being the fountain of justice in the land. Justice was said to be administered by one judiciary because one fine morning His Highness the Maharaja divested himself of his judicial functions. Does His Highness exercise any kind of jurisdiction inside the State? He has delegated his complete power of the exercise of judicial functions unto the courts that he created in the land. Therefore every kind of jurisdiction conceivable, matrimonial admirality, ecclesiastical, or whatever you can think of under the law of any law of any land is there. Who is to exercise these functions? If as mentioned in the morning only delegated powers can be exercised by the High Court, what is the power that His Highness has delegated to the Courts? When he established Courts he gave all powers that he has to exercise to the Courts.

Mr. M. Sivarama Menon *(Advocate-General)*: The question as to whether the High Court can exercise this power or whether the High Court possesses such a power does not arise in this case. Here is a Bill intended to vest specific powers in the High Court.

LIBRARY ARCHIVES Kerala Legislative Assembly

Therefore the only question now before the House is whether there should be this provision in the Special Relief Act.

Mr. V. J. Mathai *(Planters):* Yes I agree.

Mr. A. B. Salem *(Mattancheri):* I do not know what opinion the High Court has expressed upon this Bill.

Deputy President: If as you say it is established, then there is no necessity for this Bill.

Mr. A. B. Salem *(Mattancheri):* Whether I establish or not it need not be established in the Legislative Council.

Mr. V. J. Mathai *(Planters):* I may also move that Mr. Salem ought to be in the Select Committee, because as an experienced man it will be absolutely necessary to hear on all points.

Mr. A. B. Salem *(Mattancheri):* What I am submitting is not as to how the mistakes have come about. It is a mistake to think that the Specific Relief Act, I of 1877 for the first time conferred this kind of power upon the High Court. That is a great mistake. The Supreme Courts were established in India, as the Valia Court was established here, and they all had the powers. There were other High Courts established by Statute and those High Courts had not such powers because it was thought that such powers were to be in the Kings Court established by the King. Therefore, the Specific Relief Act was amended and this section was introduced. We have also a Specific Relief Act. Purposely this provision is omitted there. Our Court is on a par with the Supreme Court and therefore it was not thought necessary to have this privison in the Specific Relief Act. In the course of the judgment one Judge has said that the expression of an opinion as to whether the High Court has got the power is not necessary and another said "I do not wish to make any pronouncement on this rather important question", and the third that in deciding the question he is not without doubts on the question of the jurisdiction of the Court to issue a writ of mandamus, and he does not wish to express any final opinion on the point. So that, in order to clear the doubts of the Judges as to whether they have got the power or not—they do not know what to do and they jump the loop as it were in that judgment—it becomes necessary for the Legislature to make it clear, "if you think that you have not got the power, here we are giving you an enactment which will give you the power". Personally speaking, I do not think that the view of the High Court is correct in saying that they have not got the power. A Division Bench alone held that they have not got the power. All courts must assume jurisdiction. That is the principle of law, unless it is expressly taken away. But never mind we have got a decision and the decision stands. Therefore it went to a Full Bench and the Full Bench did not decide the point and left it in doubt in the minds of the public at large. Government is saying that they have got the habeas corpus powers. So that, to clear all doubts this Bill is absolutely necessary. Inherent jurisdiction to exercise all kinds of powers must be there. Otherwise, why should a writ be mentioned in the Constitution Act ? These are writs which will run in the name of the Sovereign and not in the name of the Court. Because these are executive functions which the executive officers fail to function and therefore the Highest Court asks them to function. Therefore, to clear doubts in the minds of the Judges and the litigant public, the Bill is necessary. With these words, I support this motion.

Mr. L. M. Pylee *(Latin-Christians-Ernakulam):* It is rather difficult for a layman to express his view upon an intricated legal question like this. However there are one or two aspects which have struck me on. This morning, a little while ago, I was surprised to know that our Cochin High Court has not the power of issuing a writ of Habeas Corpus nor of a writ of mandamus. Sir, these are powers which are distinctly judicial and in every civilised country it is a power exercised exclusively and entirely, as far as my knowledge goes, by the judiciary. On principle I should think that the fact that such an important judicial power, a power which an Englishman would cherish as one of the most essential elements in his liberty as an individual, a power the history which an Englishman would trace to the times to the time of King John—the days of the Magnacharta—is not possessed by our High Court is a disgrace to the Constitution of the Cochin State. *(Hear, hear).* The opinion expressed by the Hon'ble Member for Law is that our High Court Judges have not got that power.

Again, when I heard the Hon'ble Member for Law saying that it is a power to be exercised by the Executive I was simply shocked. It is a power which is meant as a remedy aginst the arbitrary acts of the Executive. It is not a power to be exercised by the Executive.

LIBRARY ARCHIVES Kerala Legislative Assembly

It is a very dangerous thing for such a power to be exercised by the Executive. Sir, In all the history of the trouble between the King and Parliament, as a student of history I may say that at the bottom of it all this was the question, whether the King as the highest executive in the land should exercise this power or whether it must be exercised by the judiciary. Sir, if we claim to be an enlightened community, it is necessary that our High Court is given in unmistakable terms this power. When a few years ago, with great jubilation and with great triumph and joy we raised our Chief Court to the status of a High Court. But what was the substance in it? Were you merely changing the name "Chief Court" into the name "High Court" is that all? What was the change? If you did not intend to put our High Court on a par with the other High Courts in India, what was the purpose of this change? What was the substance of the change? And you call the Chief Court, a High Court, without in the least degree making the smallest alteration in the substance of the power that had already been held by the Chief Court. I thought there was a higher purpose in changing our Chief Court into a High Court. But to my mind, after hearing the Hon'ble Member for Law, it appears to me that the change was simply meaningless, a farce.

Only one more point. In British India, all or at least several of the High Courts have got this power, and in British India you must remember that they have got a still higher tribunal namely the Judicial Committee of the Privy Council. Of course, there is al so the Federal Court in India itself. If justice is miscarried in the High Court there is a chance of going to the Federal Court and if the party finds that justice is not obtained in the Federal Court, he has got the option of going to the Privy Council not in every case, indeed but under certain rules on the subject. What is our position? We have nobody above the High Court. Ours is the highest court where we can get justice; and if justice fails in our High Court, we have no other higher court except the court of Providence (*Hear, Hear*). That is the case. While this is, is it not all the more, I ask-Hon'ble Members of this House, necessary that our High Court should be given this power to safegard the citizen against the arbitrary acts sometimes of the Executive? It is after all an ordinary power enjoyed by courts of civilised people. That is a point which I wish to draw the attention of the Hon'ble Members of this House to. Therefore, Sir, with great pleasure, I support this motion.

Mr. Joseph Pettah *(Adur):* On a point of information, may I know what is the position in the States of Travancore, Hyderabad and Mysore?

Mr. M. Sivarama Menon*(Advocate-General):* In all those places, this chapter 8 of the Specific Relief Act is omited, as we have here,

Mr. P. Kumaran Ezhuthassan *(Vadakkancheri):* May I know whether Government have any objection for this Bill to go to the Select Committee?

***Mr. A. V. Moothedan** *(Chalakkudi):* I wish to say one or two words in support of the motion. On a general principle, I think that our legislation at least regarding important laws, the Civil Procedure Code, Criminal Procedure Code, Limitation Act, etc., should be similar to the laws in British India; and so far as Chartered High Courts like Madras, Bombay and Calcutta are concerned, this power is exercised by the High Courts. My submission is that whatever may be the decisions in every case, we are not concerned. The House wants this power to be vested in the High Court. The argument of Mysore, Hyderabad and Travancore, is a different matter. What I say is, if this is allowed what is the objection of the Government? There will be no calamity that will upset the Government. Government can be carried on as normal. The necessity for these things will occur only very very seldom, and not an everyday occurrence. For instance there is a municipal election and there are two rival candidates for Chairmanship and also in the general elections. It might happen—in British India it has happened like that—that sometimes the executive through a mistake reject the nomination paper of one candidate, and the other candidate will become the Chairman. The result will be, as it is in our State, that that candidate will not be able to contest for the election of the Chairman; because there would be an election petition to the District Court and by the time the election authorities will be able to give their decision, the Chairman will be elected. In such a case, if the High Court has got the power, as is proposed to be given, by this Bill then the candidate whose nomination paper has been rejected can at once go to the High Court, and his application will be heard and if it is right it will be allowed. I say it ought to have been conferred on the High Court along with the Government of Cochin Act.

It has been stated that the High Court has no original jurisdiction. Really it is not so. The High Court has got original jurisdiction. The High Court has got the power to withdraw

*Speech not corrected by the Hon'ble Member.

LIBRARY ARCHIVES Kerala Legislative Assembly

and to try and determine, as a court of original jurisdiction, any civil suit pending in any court subordinate to it..... Therefore, there is no other ground to oppose this motion. It is similar to the British Indian High Court.

Mr. A. B. Salem *(Mattancheri)*: What the Advocate-General said was that after the courts have been established, powers have been given to different courts. Those are the exclusions that came, and delegations came. So, my contention is that whatever that is not delegated, is there.

Mr. M. Sivarama Menon *(Advocate-General)*: At this stage of this Bill Government propose to remain neutral. By that attitude, it should never be understood that Government have not appreciated the pros and cons of the question involved in this Bill. Government have the ruling of the Chief Court to the effect that they have not got such powers. A doubt has been expressed by Their Lordships in a later ruling. It is also relevant to note in this connection that none of the major States in South India, Travancore, Mysore and Hyderabad, have got these powers under their Specific Relief Acts. Therefore, Government have to investigate the matter further and consider deeply the implications of such a power; and Government have not had sufficient time for taking a definite decision. I am, therefore, authorised by Government to state before this House that Government will adopt an attitude of neutrality on this Bill at this stage.

And one further fact which for the purpose of further elucidation I may be allowed to state is this. The Bill as tabled in this House is fundamentally different in certain respects from the law as in force in British India. In Madras, Bombay and Calcutta, it is only within the Presidency Towns that the High Court can exercise that jurisdiction. Under this Bill, it is sought to be exercised throughout this State. Our High Court has no original criminal jurisdiction.

Motion put and carried

Secretary to the Legislative Council: The Title of the Bill is "The Cochin Specific Relief Act (Amendment) Bill".

Mr. V. J. Mathai *(Planters)*: I move that the Bill may be referred to a select committee consisting of—

The Adovcate-General as the Chairman.
,, Diwan Peishkar.
Mr. A. L. Antony.
,, M. Krishna Menon.
,, A. B. Salem.
,, M. Nanoo Menon.
and myself.

and the committee to report with 3 months.

Motion put and carried

Deputy President: The Bill may be referred to a select committee consisting of the above members. The Advocate-General will be the Chairman and the committee will report within 3 months.

Mr. V. J. Mathai *(Planters)*: I do not move for leave to introduce the Cochin Tenancy Act (Amendment) Bill, in view of the tenancy committee appointed now.

The Cochin Kuries Act (Amendment) Bill

Mr. V. J. Mathai *(Planters)*: I beg to move that the Cochin Kuries Act (Amendment) Bill be read in Council.

Mr. A. V. Moothedan *(Chalakkudi)*: I second it.

Mr. V. J. Mathai *(Planters)*: The only principle underlying this Bill is this: that while in the case of prized subscribers, that is those who have already taken their money, no labham is taken in cases of default there is no provision to exempt non-prized subscribers who have not received their money from paying a labham. The injustice is clear. It is an inequitous provision. I submit this for the acceptance of the House.

Mr. P. Kumaran Ezhuthassan *(Vadakkancheri)*: Mr. President, I have great pleasure to support the motion before the House. The vagaries of Kuri starters are well known only to

LIBRARY ARCHIVES Kerala Legislative Assembly